case before me. In the Indian cases the complaints were laid before magistrates and where such complaints disclosed offences not triable by magistrates it was held that it was wholly illegal for magistrates to charge and try accused persons for an offence less serious than that disclosed by the complaint so as to bring the case within their jurisdiction. In any event, having had the opportunity to refer to other Indian cases on the same point, it would appear that there are other Indian decisions which conflict with those cited by Mr. Marshall.

As regards the other grounds of appeal it is sufficient for me to say that in my opinion there was ample evidence to support the findings of the learned District Judge.

The appeals are therefore dismissed and the convictions and sentences affirmed.

Appeals dismissed.

ARUNACHALAM CHETTIAR v. KOW GUAN

[C.A. (Thomson C.J., Hill and Barakbah JJ.A.) February 28, 1963]

[K.L. — F.M. Civil Appeal No. 9 of 1962]

Landlord and Tenant—Rent controlled premises—Used partly for purposes other than human habitation—Increase above standard rent accepted by tenant—Whether evidence of termination of tenancy under, s.6, Control of Rent Ordinance, 1948—Permissive nature of s.6—Election by landlord to increase rent on most favourable terms—Recovery of possession—Control of Rent Ordinance, 1956, s.12(1)(m).

The appellant was the owner of rent controlled premises of which the respondent was a monthly tenant paying a rental of $40. From March, 1948, the rent was increased to $50 a month which the tenant paid without objection for some years. In 1958 the tenant began to get into arrears of rent in consequence of which the landlord commenced proceedings to recover possession of the premises under section 12(1)(m) of the Control of Rent Ordinance, 1956. The defence was that the increase of rent in 1948 was unlawful, firstly because the contractual tenancy existing at the time had not been terminated by notice and secondly that even if the increase was lawful the amount of such increase was limited to 10% of the previous rent, i.e., $4 a month and not 25% or $10 which was the amount actually charged, and on either of these premises the respondent was not in arrears.

The learned President of the Sessions Court gave judgment for the landlord. On appeal Ismail Khan J. (*ante* p. 101) set aside the judgment of the learned President on the ground that the landlord had failed to terminate the contractual tenancy before increasing the rent and accordingly the tenant had never been in arrears. On appeal to the Court of Appeal,

Held: (1) the only reasonable inference from the evidence was that the old tenancy was terminated and a new one created;

(2) even if that inference were not justified, there is nothing in the law, in the absence of fraud or misrepresentation or mistake, which enabled the tenant to require the landlord to refund any sum he had paid in excess of the original stipulated rent;

(3) as the premises were used both for human habitation and for purposes other than human habitation, the landlord had brought himself within an alternative most favourable to himself with regard to the permitted increase which was 25% and accordingly it was not unlawful.

Observations on sections 3 and 6 of the Control of Rent Ordinance.

Cases referred to:—

(1) *Mellows* v. *Low* [1923] 1 K.B. 522.

(2) *Bird* v. *Defonvialle* 2 C. & K. 415.

(3) *Doe d. Cheny* v. *Batten* (1775) 1 Cowp. 243.

(4) *Bohari* v. *Lim How Hia* Seremban Civil Appeal No. 7 of 1956.

(5) *Labrooy* v. *Sharma* [1951] M.L.J. 127.

COURT OF APPEAL.

W. H. Sault for the appellant.

Khoo Eng Chin for the respondent.

Cur. Adv. Vult.

Thomson C.J.: This is an appeal from a judgment of Ismail Khan, J., allowing an appeal from a judgment of the Sessions Court at Kuala Pilah.

The appellant (to whom I shall refer as "the landlord") was the original plaintiff. He is, and has been since 14th February, 1951, the owner of shophouse premises at No: 21, Lister Road, Kuala Pilah. The respondent (whom I shall call "the tenant") is the occupier of the premises and first his father and then himself have occupied them since about 1920. At all material times the premises have been subject to the provisions of the statutes dealing with rent control.

It is common ground that originally the tenant's father obtained a monthly tenancy of the premises from the landlord's predecessor in title. The father died in 1932 and the tenancy then passed to the son. There is no evidence as to what the original rent was but prior to March, 1948, it was $40 a month payable in arrears. Then as from March, 1948, the rent became $50 a month, which the tenant paid for some years. The only evidence as to how this increase of rent came about was the following statement of the tenant:—

"Rent for premises in February 1948 was $40 and rent for March 1948 was $50. No one gave me any notice to increase the rent of $40 to $50. The rent collector came and asked me to pay an increase of $10 in the rent, and he said that if I refused to do so I will have to quit the house. It was in sometime in April 1948. When he asked for $50 rent I paid him the amount. A receipt was given to me."

In 1958 the tenant began to get into arrears with his rent and, after various demands and promises to pay, the landlord, on 11th November, 1959, gave him notice to quit at 31st December,

1959. Rent was then in arrears for the period from February to September, 1959, that is at the rate of $50 a month $400, and although that amount was later tendered and accepted the landlord refused to accept a further tender of three month's rent at the same rate which was made on 28th December on the ground that "your tenancy has already been terminated". In the circumstances rent was in arrear for upwards of 14 days. That, of course, is on the assumption that the rent was $50 a month and I think that if, but only if, that assumption is correct it is conceded (at least the contrary has not been argued) that the case fell within section 12(1)(a) of the Control of Rent Ordinance, 1956, and that the landlord was entitled to recover possession.

On 30th January, 1960, the landlord commenced the present proceedings in which he asked for possession, means profits from January, 1960, till judgment and thereafter double rent down to the delivery of possession.

The defence was that the increase of rent in 1948 was unlawful by reason of the provisions of the Control of Rent Ordinance, 1948. In the first place any increase at all was unlawful because the contractual tenancy existing at the time had not been terminated by notice and in any event, even if any increase was lawful, the amount of such increase was limited to 10% of the previous rent, that is $4 a month, and not 25% or $10, which was the amount actually charged. On the first of these premises, i.e. that no increase at all was lawful, the tenant had paid $1,390 excess rent from March, 1948, till September, 1959, and even if an increase of $4 a month was lawful the amount of excess rent paid by him was $834. There was, therefore, no question of his having been in arrears with his rent at any time. In the circumstances the landlord was not entitled to possession but on the contrary owed him $1,390 (or alternatively $834) less whatever rent might have been due at whatever may be the lawful rent at the date of commencement of the proceedings and he counter-claimed for that amount.

The learned Sessions Court President gave judgment for the landlord. It is a little difficult to expiscate his reasons for his decision from a long and uncalled-for argument that the tenant could not succeed in any appeal against it, but he clearly took the view that in March, 1948, the permitted increase in rent was only 10% but from 10th December, 1949, it was 25% by reason of the amendment of the 1948 Ordinance by the Control of Rent (Amendment) Ordinance (No: 61 of 1949) which took effect from that date. On that he arrived at the conclusions, which are somewhat difficult to reconcile with each other, that the landlord was entitled to possession and *mense* profits on his claim but that the tenant was entitled to recover $126 on his counterclaim and he gave judgment accordingly.

Against that judgment the tenant appealed to the High Court. There Ismail Khan, J., took the view that the permissible increase of rent in respect of the premises was 10% from 31st January, 1948 till 10th December, 1949, when it became 25% but by reason of section 6(2) of the principal Ordinance it was a condition precedent to the landlord becoming entitled to receive these increases that he should terminate the pre-existing contractual tenancy by notice, that he had not done so, that accordingly the tenant was never at any material time in arrears but on the contrary had paid $1,040 in excess of what he was legally bound to pay and so by reason of section 3(4) of the Ordinance he was entitled to recover that sum. He accordingly set aside the order for possession and other relief made in favour of the landlord and increased the amount payable on the counterclaim to $1,040.

Against that decision the landlord has now appealed.

With great respect, I cannot but think that insufficient attention has been devoted to the general principles of the law relating to the relationship of landlord and tenant and the effect of the legislation relating to control of rent on that branch of the law and that some discussion of these topics of a general nature will assist in clarifying the issues.

And before embarking on any such discussion it is important to observe that the Control of Rent Ordinance, 1948, was not (nor is the enactment that took its place in 1956) a code setting out the whole of the law relating to landlord and tenant. It is an enactment which for the protection of tenants places certain restrictions on the exercise by landlords of the rights which they possess under the general law of the land and though it modifies these rights in certain respects it only does so within the limits of its own terms.

A tenancy arises out of a contract which confers an estate in land, though here we are only concerned with the contractual aspect of the matter. The relationship of landlord and tenant generally arises when one person (the landlord) gives to another (the tenant) the right to the exclusive possession of premises either for a definite time or for an originally indefinite time that can be terminated by either party in accordance with the terms of the contract between them. Where the period of notice to terminate an originally indefinite time is one

month the tenancy is known as a monthly one. That is the kind of tenancy concerned in the present case, as in most cases of this nature in this country, and it is generally called a contractual tenancy to distinguish it from the statutory tenancy which can in certain circumstances arise after it has been terminated by reason of the operation of the legislation relating to rent control.

Such a contractual tenancy is described in the following passage from Hill and Redman on "Landlord and Tenant" (13th Edition, p. 39) which is based on the judgment of McCardie, J., in the case of *Mellows* v. *Low*[1]:—

> "A weekly or other periodic tenancy is a continuing tenancy by the week or other period, and does not expire without notice at the end of the first week or period or at the end of each succeeding week or period, there being not a reletting at the beginning of every week or period but a springing interest which arises and which is only determined by a proper notice to quit."

So long as such a tenancy and the contract from which it arises are in force the landlord cannot compel the tenant to pay an increased rent. He has agreed to accept a certain sum by way of rent and he is bound by his agreement. He may, however, terminate the existing tenancy by notice and offer the tenant a new tenancy at an increased rent. And if the tenant accepts then he is bound to pay the new rent which he has agreed to pay.

If the original tenancy was created orally, as it was in this case, the notice to terminate it may be generally given orally (see *Bird* v. *Defonvialle*[2]).

On the evidence in the present case the only reasonable inference is that the old tenancy was terminated and a new one created. The tenant said that in 1948 the landlord's agent told him if he refused to pay $50 a month he would have to quit. He agreed and he went on paying the increased rent month by month for nearly twelve years.

But even if that inference were not justified it is apposite to observe that if in the course of a tenancy the tenant agrees to pay and does pay more than the rent originally stipulated then in the absence of anything in the way of fraud or misrepresentation or mistake there is nothing in the law which enables him to require the landlord to refund any sums he has paid in excess of the original stipulated rent. It might be that the landlord would be unable to compel him to go on paying the increased rent on the ground that any implied agreement to pay it would be unenforceable for want of consideration. On the other hand if the arrangement had gone on for a long time and there was no evidence as to how it originated it would be open to the Court to draw the inference that there had been a termination of the old tenancy and a creation of a new one (see *Doe d. Cheny* v. *Batten*[3]).

In practice, however, all that is subject to the statute law relating to rent control and I now turn to the relevant provisions of the Control of Rent Ordinance, 1948, which replaced the Rent and Charged Land (Restriction) Enactment, 1940, as from 31st January, 1948, and which was in its turn replaced by the Control of Rent Ordinance, 1956, with effect from 1st July, 1956.

Section 2 of the 1948 Ordinance defines what the Ordinance calls the "standard rent" of premises to which it applies as the rent, if any, fixed by the Rent Assessment Board under the 1940 Enactment prior to its repeal or, where no such rent had been fixed, the rent as at 25th September, 1940. In the present case it is admitted on the pleadings that the standard rent of the premises was $40 a month.

Section 3 provides that "save as hereinafter in this Ordinance provided" it shall be unlawful for a landlord to receive a rent in excess of the standard rent of any premises. If he does he is guilty of a criminal offence and by sub-section (4):—

> "A tenant who has paid his landlord a sum in excess of the rent which may lawfully be received under the provisions of this section may recover such sum from the landlord."

The whole of section 3, however, is subject to the provisions of section 6, the side note to which is "Permitted increases of rent". Section 6(1) provides that "it shall not be unlawful" for a landlord to increase the rent of premises "in the cases and to the extent following". Then it sets out four classes of cases with the appropriate extent to which the rent may be increased with which I shall deal later.

Then follows sub-section (2) which is as follows:—

> "Nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law prior to increasing the rent."

These provisions are perfectly clear but, putting aside for the moment sub-section (2) of section 6, it is to be observed that there is nothing in them considered by themselves that enables a landlord to increase the rent of his premises up to the limit of the standard rent together with the permitted increase. All that is said is that the Ordinance does not make such an increased rent unlawful and that it does not attract the penal consequences of section 3. But there is no obligation upon the tenant to pay such an increased rent unless he wishes to. His obligation is limited by the terms of his contract of

tenancy and so long as that contract exists he is entitled to the benefit of it.

That is just what sub-section (2) says. It makes it clear that if the lawful rent under the Ordinance is higher than the contractual rent and if the landlord wishes to compel payment of that higher rent then he must get rid of the contractual relationship with his tenant by terminating the existing tenancy in accordance with the ordinary law of contract and persuade the tenant to enter into a new contract of tenancy providing for the higher rent. Hence "the necessity" for determining the old tenancy "according to law". The law from which the necessity arises is the general law of contract and not the Control of Rent Ordinance.

Now, of course, if the landlord wishes to determine the old contract according to law he must give the appropriate notice to the tenant. If he does not do so and then make a new agreement with the tenant he cannot recover an increased rent that would be lawful under the provisions of the Ordinance. In the present case my own view is that the evidence clearly gives rise to the inference that notice was given and in this connection it is to be observed that the Ordinance, unlike the English Rent Acts, does not provide in terms for the giving of a notice which, moreover, under the English Acts must be in a specified form.

But all this overlooks the real nature of the tenant's case. His case is this. He says to the landlord: "I do not owe you money. You owe me money. Therefore my rent cannot be in arrears and far from being entitled to eject me you must now pay what you owe me."

The real question, therefore, is whether there is anything in the Ordinance that in the events that have happened has the effect of creating a debt from the landlord to the tenant and to my mind the answer to that question depends on whether the amount of rent actually paid and received was rendered unlawful by anything in the Ordinance.

That that is the question follows from the terms of section 3 of the 1948 Ordinance, and the corresponding provisions of the 1956 Ordinance do not differ in any material respect. Sub-section (1) says it shall be unlawful for a landlord to increase or attempt to increase or to receive or recover a rent in excess of the standard rent, but that is subject to the provisions of section 6 as to permitted increases and, by sub-section (4), if a tenant pays a sum in excess of the rent "which may lawfully be received under the provisions of this section" he may recover such sum from the landlord. In other words the section only creates a debt from the landlord to the tenant in respect of anything the landlord receives in excess of what the section makes it lawful for him to receive, that is anything in excess of the standard rent and the permitted increases. There is nothing in it which can operate to create a debt in respect of anything the tenant may have paid in excess of the amount of rent stipulated in his original contract of tenancy so long as the total amount paid is within the limits imposed by the Ordinance. If there is any debt in this regard it can only arise from the general law of the land and, as has been pointed out, where payments have been made voluntarily in the absence of fraud, misrepresentation or mistake, and there is nothing of the sort here, there is no debt.

I would add that I can find nothing in these results which is in any way in conflict with the unreported case of *Bohari* v. *Lim How Hia*[4] or the case of *Labrooy* v. *Sharma*[5]. In the first of these cases Smith, J., clearly relied on the second and in the second case the situation was entirely different from the present one. It was not a case where a tenant was trying to recover rent which he claimed to have overpaid, it was a case where a landlord was seeking to recover arrears of rent at the permitted rate which was higher than the contractual rate not having secured the agreement of the tenant to the increase.

To proceed, the premises in the present case are used partly for human habitation and partly for business purposes. The standard rent is $40 a month and so the recoverable rent, to use a phrase introduced by the 1956 Ordinance to decide the maximum lawful rent, was that amount together with the permitted increases. The only question, therefore, that remains to be considered is what these increases were.

Under the 1940 Enactment rents were, generally speaking and subject to the discretion of a statutory Board, "frozen" at their level as at 25th September, 1940. That is the "standard rent" of the 1948 Ordinance. In 1948 the general level of prices had risen very greatly since 1940 and one of the purposes of the 1948 Ordinance clearly was, while maintaining the general system of rent control, to permit certain modest increases. The cases in which and the extent to which such increases were permitted were set out in section 6. The provisions of that section which are relevant here and which are to be read as at and from the date of the Ordinance which is 31st January, 1948, are as follows:—

"6. (1) It shall not be unlawful for a landlord to increase the rent of the premises let by him in the cases and to the extent following, namely—

. . . . . .

(c) where the premises were let on or before the

twenty-fifth day of September, 1940, and there has been no increase of rent subsequent to that date, to the extent set out in the third column of the First Schedule to this Ordinance in respect of the types of premises and the standard rents set out adjacent thereto in the first and second columns of the said Schedule;"

The First Schedule was amended with effect from 10th December, 1949, by the Control of Rent (Amendment) Ordinance of that year and after that date there is no doubt as to the position. The first column of the amended Schedule mentioned "premises used wholly or partly for purposes other than human habitation", the corresponding "standard rent" mentioned in the second column was "up to $150 per mensem" and the corresponding percentage in the third column was "25%". On that it is crystal clear that so far as the Ordinance is concerned the rent which it was not unlawful for the landlord here to receive, that is the maximum recoverable rent, was the standard rent, that is $40, increased by 25% making a total of $50.

Prior to the amendment of the First Schedule the position is at first sight not quite so clear. So far as it applies to the present case the original schedule provided that in the case of "premises used for human habitation" where the "standard rent" was above $35 and up to $50 a month the percentage increase should be 10% and that in the case of "premises used for purposes other than human habitation" where the standard rent was up to $150 the percentage increase should be 25%. The premises here were used both for human habitation and for purposes other than human habitation and the question therefore arises which is the appropriate percentage.

Considered in the light of the Ordinance as a whole the answer can easily be seen. Section 3 attached consequences of a highly penal nature to the receipt of rent declared to be unlawful and section 6 mitigated the rigour of section 3 by saying that in certain cases certain increases over the standard rent should not be unlawful. In other words, section 6 creates certain exceptions to the rule of section 3 that a rent in excess of the standard rent is unlawful and in the present case the landlord is entitled to say that as the premises were used for "purposes other than human habitation" the permitted increase was 25% which was the actual increase made and that therefore he had brought himself under one of these exceptions and so escaped the penal provisions of section 3.

It is true that if the premises were "used for human habitation" the percentage would only be 10%. There is, however, no conflict. The landlord may bring himself within one of two alternative sets of conditions, and there being nothing in terms to say which is to be preferred it must be held that section 6 being a permissive one the landlord does no wrong if he complies with the condition most favourable to the person to whom the section gives permission, that is himself. Such a view, moreover, is in accordance with the general scheme of the Ordinance which clearly is to relax to a limited extent the more rigorous provisions of the 1940 Enactment.

In the circumstances I would allow the appeal, set aside the judgment of the High Court and order that judgment be entered for the original plaintiff who should also have his costs here, in the High Court and in the Sessions Court.

Hill and **Barakbah JJ.A.** concurred.

Appeal allowed.

Solicitors:—*Sault, Keith Sellar & Co.; George & Khoo.*

LIEW MOOI & ANOR. v. DIL BAHADUR BURA & ORS.

[O.C.J. (Gill J.) March 18, 1963]
[K.L. — Civil Suit No. 358 of 1962]

Damages—Fatal Accident—Loss of expectation of life—Assessment of damages—Civil Law Ordinance, 1956, ss.7 and 8.

The deceased a timber lorry attendant of 34 years was killed in a road accident. His monthly income at the time of the accident was $150 although there was evidence that he was earning $220 two months earlier and $300 prior to that. The administratrix and co-administrator of the estate of the deceased now claimed damages for loss of expectation of life on behalf of the widow, the four children and the parents of the deceased and also for and on behalf of the estate of the deceased. The first two defendants were the drivers of the vehicles in question. They blamed each other for the accident. The third defendant was the agent or servant of the second defendant.

Held: (1) in the circumstances of this case the accident was caused solely by the negligence of the second defendant and that he alone was liable to pay damages;

(2) taking into consideration the usual factors including the normal expectation of an active working life for a man of 34, the hazards and vicissitudes of life, the accelerated payment of compensation in a lump sum and allowing a suitable reduction for the above factors, general damages under section 7 assessed at $15,750 and special damages at $500 for funeral expenses.

Case referred to:—

(1) *Heatley & Anor.* v. *Steel Co. of Wales Ltd.* [1953] 1 All E.R. 489.

ACTION FOR DAMAGES.

G. T. S. Sidhu for the plaintiffs.

M. Shankar for the 1st defendant.

Henry Cheah for the 2nd and 3rd defendants.

Cur. Adv. Vult.